Supreme Court of the United States.

No. 264.—October Term, 1903.

The Terre Haute and Indianapolis Railroad Company, Plaintiff in Error, *vs.* The State of Indiana ex rel. William A. Ketcham, Attorney General. } In error to the Supreme Court of the State of Indiana.

[May 31, 1904.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit brought by the State of Indiana to ascertain and to recover from the plaintiff in error the total net profits made by the latter over fifteen per cent on the true cost of construction of its railroad, from the time when the net earnings equalled that cost with ten per cent on the same added. The claim of the State was made under § 23 of the charter of the railroad, approved January 26, 1847, and four acts of 1897 to be referred to. The complaint admits, and the answer sets up, a surrender on January 17, 1873, of the charter of 1847, on which the supposed obligation was based, and an acceptance of the general railroad law by the company, and also a judgment for the company in March, 1876, on a former complaint for the same cause. The answer also makes a general denial and invokes the Fourteenth Amendment and other relevant parts of the Constitution of the United States. The case was referred to a master, who ruled that the former judgment was not a bar, but ruled also that the company was not liable. The superior court ruled the other way and gave judgment against the company for $913,905.01. This judgment was affirmed by the Supreme Court of the State, and the case then was brought here by writ of error.

By § 22 of the charter the railroad is given absolute discretion in the fixing of charges. Then, by § 23: "When the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon, the legislature may so regulate the tolls and freights that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving [reserving?] such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of State, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per

annum cannot be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses," &c. By § 24: Semi-annual dividends of so much of the profits as the corporation may deem expedient are to be made, and "the directors may retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper." By § 35, repealed in 1848, the corporation is to keep a fair record of the whole expense of making and repairing its road, &c., and also a fair account of the tolls received, and the State is to have the right to purchase the stock of the company after twenty-five years for a sum equal, with the tolls received, to the cost and expenses of the railroad with ten per cent.

The complaint relied also upon an amendment of section 23, on February 24, 1897, attempting to make the above mentioned surplus profits a debt and to make the company accountable from the beginning of such profits. The complaint still further relied upon an act of January 27, 1897, requiring the railroad to account; an act of March 4, 1897, appropriating the net earnings of the company above fifteen per cent, &c., as above, to the use of common schools, and authorizing a demand and a suit; and an amendment of the general railroad law on February 18, 1897, after the surrender of this company's charter, providing that all liabilities to the State, whether inchoate or complete, under special charter, were and should be reserved, notwithstanding the past or future acceptance of the surrender of such special charters.

The Supreme Court, while agreeing that the right of the State must depend on the original charter, did give force to this later legislation, in terms, as providing a remedy, and, on the construction which we are compelled to give to the charter, did also give force in fact to the amendment to the provision attempting retrospectively to save the charter obligations after a surrender had been accepted. Therefore the question is properly here whether these statutes impaired the rights of the railroad under the Constitution of the United States. For in order to determine whether the later legislation impairs those rights, this Court must decide for itself what those rights were. If in the opinion of this Court the State had lost all right to demand any sum whatever under § 23 of the charter, legislation necessary to enforce such a demand is invalid and may be pronounced so by this Court, notwithstanding the fact that the cause of action now is based upon the original act. We shall recur to the question of our jurisdiction after discussing the merits of the case, which we must do to make what little we have to add plain.

The Supreme Court of the State seems, although it is not clear, to have construed § 23 as creating by itself alone a debt to the State which accrued as fast as surplus profits were realized, which, under that section,

might have been required to be paid over to the treasurer of State. It is pointed out that in 1847 the State had no credit and was in need of roads and schools, and that therefore it was natural to provide for the handing over of any surplus after a liberal return to the owners of the road. It is thought that the express grant of an absolute right to fifteen per cent negatives the right to more, that the provisions for an account in §§ 23 and 35 and the mandatory language as to the surplus confirm this result, and that it is unreasonable to suppose that the legislature, after indicating what by the agreement of the parties would be a fair demand of the State, should leave the right of the State in abeyance until a future legislature should choose to act. In this way the amendment of § 23 in 1897 is practically carried into effect. While repudiated as legislation it is adopted by construction, and is found to express only the meaning of the original act.

We are driven to a different construction of the charter, notwithstanding the deference naturally felt for the decision of a State Court upon State laws. The language is plain. The legislature "may so" regulate tolls "that" not more than fifteen per cent shall be divided, "and" the surplus profit shall be paid over. The word "may," it is agreed, is permissive, not mandatory. In the next place it is only upon its regulation of tolls, so that not more than fifteen per cent shall be divided, that dividends are confined to that sum. Otherwise the general power, given by § 24, to declare such dividends as the company deems expedient, remains in force. Finally, the payment over of the surplus profits above fifteen per cent is not a separate, independent and absolute mandate, but is connected with "so regulate tolls that" by "and." Like the cutting down of dividends, it is a result of the regulation. Again, the duty of the corporation to furnish the legislature a statement of expenditures is only "if required." It might be required in order to be certain whether it was advisable to regulate tolls. Pehaps if the legislature had regulated them it might be required in order to find out what was due. The provision for a record and an account in the repealed § 35 seems to us to have little bearing. They were required there, primarily at least, with reference to the possible purchase of the stock by the State. We infer that the State courts considered the words "regulate tolls" to refer solely to fixing the amount to be charged, and regarded the payment over of the surplus as an independent mandate. It seems to us that the words as here used meant more, and embraced not only fixing the amount to be charged to the public, but an order for the division of earnings between the railroad and the schools. The provision as to the surplus over fifteen per cent is not sufficiently accounted for if the regulation of tolls is intended to make the profits as near fifteen per cent as may be.

Not only the absolute discretion as to dividends given by § 24, but the similar discretion given by the same section as to the proportion of profits to be retained, confirms the grammatical construction of § 23. Circum-

stances might change, and knowledge might change. It is agreed that they did not know much about railroads in 1847. The corporation was allowed to make and to distribute or retain such earnings as it could, subject to the power of the State in certain events to require it to pay over extra profits, or to sell its stock. But which, and whether the State would make either demand, was left undecided, and until the State elected the whole earnings of the company were its own.

It follows that when the company surrendered its charter in 1873, there having been no attempt by the State to regulate tolls before that time, the company was free from liability or the possibility of demand. Therefore it is only by attempting, as it did attempt in its complaint, to apply the subsequent amendment of the general railroad law that the State can come into court. That law, it will be remembered, purported retrospectively to save rights under surrendered charters. It does not need argument to show that this amendment could not affect the plaintiff.

The case then stands thus: The State Court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation. It clearly did rely upon that legislation to some extent, but exactly how far is left obscure. We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the State Court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this Court. *Louisville Gas Co.* v. *Citizens' Gas Light Co.*, 115 U. S. 683, 697. We may add that it is admitted that one of the acts of 1897 was necessary to authorize a demand and so to create a cause of action. It was for want of an authorized demand that the former suit was held no bar. But in our opinion the State had no right in 1897 to make a demand.

Judgment reversed.

True copy.

Test:

Clerk Supreme Court, U. S.